

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3617

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DELTON D. DAY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Outagamie County:
DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Delton Day appeals a trial court order that denied his 1995 motion to modify the ninety-six month concurrent sentences for child enticement and sexual assault of a child he received in 1993. Day argued that the sentencing court wrongly issued a prison term without first expressly considering a fine as an alternative sentence. Day raises similar arguments on

appeal. We agree with the trial court that Day's sentence modification motion had no merit. We therefore affirm the trial court's order denying Day's motion.

First, the sentencing court stated that Day's crime, character, attitude, probation failures, and criminal history rendered incarceration the only viable sentence. By its express terms, this statement overtly rejected all alternative sentences, including fines, regardless of the fact that it did not specifically mention the term "fine." This shows that the trial court did in fact rule out a fine as a possible sentence, in light of the crimes' gravity, Day's character, and his dangerousness to society. See *State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984).

Second, if the trial court had not clarified Day's need for incarceration, we could still examine the record for anything that would have excluded a fine as a viable alternative sentence. Here, the severity of Day's sentence itself demonstrates the fallacy of Day's argument in favor of a fine. His sentence's severity directly shows how the trial court viewed his crime, character, and dangerousness. Day's time in prison is directly proportional to his crime, character, and dangerousness. By implication, his incarceration's relative severity excluded a fine as a viable alternative.

Last, Day's motion was untimely. It was too late to qualify as a statutory motion to modify sentence under § 973.19, STATS., and it did not state any new factor that might have qualified it as new factor based motion to modify sentence. See *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Rather, it sought to raise a matter Day should have raised at the time of sentencing or by direct appeal from his conviction. In sum, Day had no basis to seek modification of his sentence, and the trial court properly denied his motion.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.